

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE	)	
PROPRIETY OF PROVISION OF INTERLATA	)	CASE NO.
SERVICES BY BELL SOUTH	)	2001-00105
TELECOMMUNICATIONS, INC., PURSUANT	)	
TO THE TELECOMMUNICATIONS ACT OF	)	
1996	)	

O R D E R

BellSouth Telecommunications, Inc. ("BellSouth") has petitioned the Commission to modify the Kentucky Service Quality Measurements ("SQM") and Self-Effectuating Enforcement Mechanism ("SEEM") Plans (collectively, the "Performance Plan"). The Performance Plan is designed to ensure that BellSouth's Operations Support Systems ("OSS") are non-discriminatory and commercially viable to support and sustain competitive entry by Competitive Local Exchange Carriers ("CLECs").

On October 19, 2001, the Commission adopted the SQM and SEEM Plans developed by the Georgia Commission with only one variation. That variation applies to the P-13 - Local Number Portability ("LNP") Disconnect Timeliness Measure. Penalties associated with the P-13 measure were held in abeyance pending further review by the Commission. A full review of the Performance Plan and the P-13 measure was to occur no later than 6 months from the date of the Order. BellSouth requested and the Commission granted two consecutive extensions for filing its petition seeking any changes to the Performance Plan. BellSouth filed its petition on December 19, 2002,

requesting extensive revisions, including substantive changes to many service quality measurements and performance penalties, as well as numerous administrative changes that would not impact the calculations of measurements or penalties. On August 8, 2003, a data request was issued to gather additional information on BellSouth's position. Parties have filed several motions in this case, most of which concern performance penalties associated with the line sharing provisions of the Performance Plan. The matter is now ripe for a decision.

### Introduction

The Commission has been addressing issues relating to BellSouth's petition to provide intra-LATA, in-region long-distance service since 1996. On April 26, 2001, the Commission initiated this proceeding to compile a record that would enable the Commission to advise the Federal Communications Commission ("FCC") as to whether BellSouth should be permitted to enter the in-region, interLATA long-distance market consistent with Section 271 of the 1996 Telecommunications Act. Prior to this proceeding, in a predecessor case,<sup>1</sup> the Commission conducted hearings during August of 1997 and August of 1998 to address BellSouth's compliance with 47 U.S.C. § 271(c), including 271(c)(2)(B) (the "14-point competitive checklist"). In 1999, the Commission began working in concert with the other states in the nine-state BellSouth region to process information with regard to BellSouth's regional systems and CLEC expectations. These efforts culminated in the crafting of performance measurements. This Commission, along with most others in the nine-state region, determined that

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<sup>1</sup> Case No. 1996-00608, Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996.

having a similar package of performance measures in BellSouth states would benefit consumers and the overall industry. Although no Section 271 application had been filed with the FCC for Kentucky, the Commission issued a preliminary advisory opinion on July 8, 1999 concluding that BellSouth had met 7 of the 14 competitive checklist items.

Two years later, in the instant case, the Commission again held two hearings. The first of these hearings addressed specific performance measures and penalties. The later hearing was conducted to determine specific compliance with the 14-point competitive checklist. During the first hearing, BellSouth expended considerable effort in establishing that its systems in the nine-state region were “substantially the same” and that adopting the service quality measures of Georgia, with its robust third-party testing, would be more prudent and less taxing on the resources of both the Commission and BellSouth. However, BellSouth proposed a voluntary SEEM (“VSEEM”) plan for Kentucky that was less stringent than that of Georgia. The Commission adopted both the Georgia SQM and SEEM plans and denied BellSouth’s proposed VSEEM because of concerns that it “may not adequately protect the Kentucky market.”<sup>2</sup> The Commission noted in its Order that the performance plan would assist the Commission in maintaining “the current level of competition and expedite the resolution of future disputes.”<sup>3</sup>

After the second hearing, the Commission issued an Advisory Opinion to the FCC.<sup>4</sup> Although noting several areas of concern, this Commission concluded that

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<sup>2</sup> Case No. 2001-00105, Order dated October 19, 2001 at 2.

<sup>3</sup> Id.

<sup>4</sup> Case No. 2001-00105, Order dated April 25, 2002.

BellSouth had achieved compliance with the Section 271 Competitive Checklist. The Commission relied in substantial part on the existence of the Performance Plan adopted as a result of the first hearing. On September 18, 2002, the FCC approved BellSouth's Section 271 Application for in-region, inter-LATA long-distance service in Kentucky, and four other states in the BellSouth region. In its order, the FCC concluded that "[b]ecause these [SEEM] plans are modeled after the Georgia SEEM plan that we approved in the BellSouth Georgia/Louisiana Order, we need not discuss them in detail here but refer to our finding in that Order."

During its review of BellSouth's OSS performance, the Georgia Commission ordered BellSouth to demonstrate its compliance with Section 271 requirements by conducting an independent, third-party test of the readiness of specific aspects of BellSouth's OSS and related interfaces, documentation, and processes supporting local market entry by the CLECs. The Georgia Commission established a third-party testing program for BellSouth's OSS utilizing KPMG Peat Marwick ("KPMG"). In general, the performance monitoring and enforcement mechanisms implemented throughout the country evolved in some shape or form from the Verizon/New York Section 271 review process, which was the first to perform extensive independent OSS testing and compliance analysis. The FCC has repeatedly advised that it would consider carrier-to-carrier testing, independent third-party testing, and internal testing, in the absence of commercial usage, to demonstrate commercial readiness of an Incumbent Local Exchange Carrier's ("ILECs") OSS.<sup>5</sup> This Commission's decision to adopt the Georgia

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<sup>5</sup> See e.g. FCC 98-271, Louisiana II Order dated October 13, 1998, at 85-86 and FCC 99-404, Verizon/New York Order dated December 22, 1999.

Performance Plan was based on this guidance from the FCC, BellSouth's promotion of the Georgia performance plan and the fact that Georgia had established extensive independent third-party testing in evaluating the validity of its Performance Plan.

BellSouth's Petition to Modify Kentucky Performance Plan

In BellSouth's December 2002 petition to modify the Kentucky Performance Plan, BellSouth advised that, in general, its proposed changes to the SQM and SEEM plans in Kentucky were consistent with those ordered by the Georgia Commission. BellSouth acknowledged, however, that it included proposed revisions that had been denied by the Georgia Commission. Through a Commission Staff data request, BellSouth was asked to clarify the differences between the proposed Kentucky Performance Plan and the Performance Plan implemented in Georgia. BellSouth filed its response to the data request but advised that it "believes that neither the plan it proposed in December 2002 nor the plan adopted in Georgia address the true realities."<sup>6</sup>

BellSouth now wishes to continue the current Performance Plan until an updated plan can be developed. BellSouth believes that a more "improved and streamlined approach can be implemented based on actually measuring parity and the wholesale customer's quality of service."<sup>7</sup> Thus, BellSouth no longer desires to make immediate changes to the Performance Plan, and much of its December 2002 petition is now moot. However, two issues remain: (1) how to handle the performance penalties held in abeyance for P-13, LNP Disconnect Timeliness; and (2) how to handle SEEM penalties related to line sharing. It is to these issues we now turn.

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<sup>6</sup> BellSouth response to data request, filed September 26, 2003.

<sup>7</sup> Id.

## LNP Performance

BellSouth presented evidence during the performance measures hearing regarding the difficulties associated with the P-13, LNP Disconnect Timeliness measure. The Commission ultimately held in abeyance penalties associated with this measure pending further review by the Georgia Commission and by this Commission. BellSouth has proposed 3 new measures relating to LNP performance as a substitute for the P-13, LNP Disconnect Timeliness measure: P-13A, LNP – Percent out of Service < 60 Minutes; P-13B, LNP – Percentage of Time BellSouth Applies the 10-digit Trigger Prior to the LNP Order Due Date; and P-13C, LNP – Average Disconnect Timeliness Interval (Non-Trigger). BellSouth advises that the Georgia Commission has adopted similar measures with clerical differences only. BellSouth proposes these replacement measurements because the current measure (1) does not accurately capture the customer's experience when the customer's telephone number is ported; and (2) includes activities in the porting process over which BellSouth has no control. BellSouth intends to calculate the new measures retroactively and to pay the associated SEEM penalties from the first of November 2001 through the present month's data.

As discussed herein, the Commission finds that the Georgia Performance Plan is reasonable and therefore will require BellSouth to recalculate the performance metrics for LNP Performance, based on the Georgia performance measures. Accordingly, BellSouth must pay the associated SEEM penalties, retroactively, from November 1, 2001 to the current data period and on a continuing basis until further ordered by the Commission. BellSouth agreed to these retroactive payments at the time the penalties were held in abeyance.

BellSouth Motion to Modify SEEM Plan And Eliminate SEEM Penalties Related to Line Sharing

Based on the FCC's Triennial Review Order ("TRO") that became effective October 2, 2003, BellSouth believes it should be relieved of any further obligation to pay SEEM penalties that relate to the provision of line sharing.<sup>8</sup> As explained by BellSouth, the FCC has now determined that the HFPL no longer should be available as a UNE, subject to grandfathering provisions and a transition period. BellSouth further argues that the FCC's determination regarding line sharing removes it from the Telecommunications Act's Section 251 obligations pertaining to non-discriminatory access to UNEs. Therefore, BellSouth requests that SEEM penalties related to line sharing performance measures be eliminated.

Intervenors<sup>9</sup> filed motions objecting to BellSouth's motion to modify the SEEM Plan, stating that BellSouth seeks to enjoin the SEEM plan before any hearing or argument on the substantive motion to modify the plan. The Intervenors argue that BellSouth erroneously interprets the FCC's TRO to require the elimination of SEEM penalties for line sharing. The Intervenors advise that BellSouth's motion should be denied for three reasons: (1) the Commission has jurisdiction over the SEEM Plan to protect Kentucky's citizens from anti-competitive behavior, including enforcement of BellSouth's 271 obligations; (2) BellSouth remains obligated to provide non-

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<sup>8</sup> Line sharing occurs when a CLEC leases, as an unbundled network element ("UNE"), only the high frequency portion of the loop ("HFPL") to provide broadband (high-speed) data services while the low frequency portion of the loop remains with the ILEC to provision voice service to the same end-user.

<sup>9</sup> DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), AT&T Communications of the South Central States, Inc. ("AT&T"), and MCImetro Access Transmission Services, LLC ("MCI").

discriminatory access to line sharing both under the FCC's TRO and the Telecommunications Act of 1996; and (3) excusing BellSouth from providing non-discriminatory access to line sharing under the SEEM Plan is against the public interest and the purpose of the SEEM Plan.

The Commission, consistent with its prior Order,<sup>10</sup> hereby denies BellSouth's Motion to Modify the SEEM Plan to eliminate performance penalties associated with line sharing. BellSouth remains obligated to provide line sharing during the transition period and, therefore, performance monitoring and compliance should continue until line sharing is fully eliminated pursuant to FCC orders.

#### Revisions to Performance Plan

In its response to the Commission Staff's data request, BellSouth revised its position and no longer requests the changes it proposed to the Kentucky Performance Plan in its December 2002 petition. BellSouth also indicated that the Performance Plan established in Georgia is inappropriate for Kentucky. BellSouth asks, instead, that the Commission continue with the current Kentucky Performance Plan in the interim until an updated plan, unique to Kentucky, can be developed.

To accept BellSouth's revised proposal would reverse the rationale previously adopted by the Commission, and previously promoted by BellSouth, for establishing regional performance plans that require fewer resources to implement and manage. Furthermore, the review process would necessarily require this Commission to attempt to validate performance measures without the benefit of any independent third-party testing such as that performed in other states such as Georgia and Florida. Relying on

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<sup>10</sup> Case No. 2001-00105, Order dated December 15, 2003.

the independent third-party testing of BellSouth's OSS by Georgia and not recreating the process was the primary rationale for adopting the Georgia Performance Plan in Kentucky.

Thus, the Commission affirms its initial decision on this issue by adopting, in total, the Georgia Performance Plan as recently modified. Georgia has expended considerable effort in establishing and maintaining its Performance Plan and has staff dedicated to monitoring performance-related issues. Most importantly, Georgia has the benefit of a historical relationship with an established independent third-party testing consultant, BearingPoint (formerly KPMG). Furthermore, unlike Kentucky, Georgia has extensive CLEC activity to assist in determining the appropriateness of performance measures.

Though the Georgia Performance Plan is not perfect, Georgia enjoys an established foundation of independent third-party testing, an ongoing review process, and extensive competitive activity and participation. This Commission cannot independently establish a Performance Plan without recreating a resource-intensive process similar to Georgia's.

Nothing ordered herein shall serve to prohibit BellSouth from proposing a Kentucky-specific performance plan which sets out a full and complete description of the plan with associated penalties. BellSouth's proposal should also describe whether certain penalties were eliminated and how the plan will ensure that BellSouth continues to provide similar service to CLECs as it does to itself. Further, BellSouth should describe how this Commission should fund a third-party test of such a proposed plan.

In the event BellSouth proposes such a plan, the Commission will fully consider whether such a plan should be substituted for the current Performance Plan in whole or in part.

IT IS THEREFORE ORDERED that:

1. BellSouth shall recalculate the performance metrics for LNP performance based on those replacement measures adopted by the Georgia Commission and shall pay the associated SEEM penalties retroactive to November 1, 2001.

2. BellSouth shall continue to pay performance penalties associated with line sharing until its obligations in this regard are ended by the FCC.

3. The Georgia Performance Plan, including future modifications made by the Georgia Commission, is hereby adopted.

4. Within 20 days of the date of this Order, BellSouth shall file a tariff containing the same provisions as the current Georgia Performance Plan.

5. BellSouth shall file a tariff reflecting any future modifications adopted by the Georgia Commission, within 10 days of adoption in Georgia.

6. Nothing contained herein precludes BellSouth from submitting a proposal for a Kentucky-specific performance plan and associated penalties as described infra.

Done at Frankfort, Kentucky, this 11<sup>th</sup> day of May, 2004.

By the Commission

ATTEST:



Executive Director